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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

—v.—

JAMES "SLOPPY" FLOYD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, *AMICI CURIAE*

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In the

Supreme Court of the United States

October Term, 1966

No. 87

Julian Bond, Dr. Martin Luther King, Jr., and
Mrs. Arel Keyes,

Appellants,

—v.—

James "Sloppy" Floyd, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and the American Civil Liberties Union of Georgia, which file this brief with the consent of the parties, believe that the case at bar raises fundamental First Amendment questions. The central issue is whether a duly elected representative to a state legislature may be barred from taking his seat solely because his views on issues of public importance are incompatible with the views held by a majority of the legislature.

For the reasons set forth in this brief, we believe the Court should clarify the importance of free speech for public officials.

Statement of the Case[1]

On June 16, 1965, at a special election called pursuant to a re-apportionment decision of the court below (*Toombs* v. *Fortson*, 241 F. Supp. 65), the appellant Julian Bond, a Negro, was elected to the Georgia House of Representatives by a vote of 2,320 to 487, or 82% of the total votes cast (R. 4). Mr. Bond would ordinarily have taken his seat on January 10, 1966, the opening day of the regular legislative session following the special election (R. 133).

On January 6, 1966, the Student Non-Violent Coordinating Committee (SNCC), a militant civil rights organization of which appellant was a member and employee, issued a statement relating to United States warfare in Vietnam and civil rights of Negroes. The statement expressed the view that the United States government had been deceptive in claiming concern for the freedom of the Vietnamese people and of colored people around the world and in this country (R. 136). It recounted the violence SNCC workers had experienced in the South and cited the example of Samuel Young, a SNCC worker who "was murdered because United States law is not being enforced" (R. 136). The SNCC statement accused the government of "pursuing an aggressive policy in violation of international law" (R. 136) and questioned the ability and desire of the gov-

[1] The facts are not in dispute in this case. The complaint, the stipulation of the parties, and the factual recitation in the opinion below all agree to the events involved.

ernment to guarantee free elections abroad while civil rights laws were not fully implemented in this country (R. 137). Expressing "sympathy with and support" of those unwilling to respond to the draft, the statement asked, "Where is the draft for the freedom fight in the United States?" (R. 137). The statement concluded with this call:

> We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost their lives as painfully as in Vietnam (R. 137).

On the day the statement was issued, Mr. Bond stated in response to questions from a reporter that he concurred in it and that as a pacifist, he was eager to encourage people not to participate in the war in Vietnam for any reason that they might choose (R. 111). He said he felt it to be his responsibility "to oppose things I think are wrong" (R. 112). He felt it was "hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States" (R. 111).[2]

On January 10, 1966, the opening day of the Legislative session, five petitions contesting Representative-Elect

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[2] Appellant's full remarks were recorded on tape by a reporter for an Atlanta radio station. The tapes were admitted into evidence at the proceedings before the Special Committee of the House of Representatives.

Bond's right to be seated were filed by 75 white members of the 205 member Georgia House of Representatives (R. 115). The movement to bar Mr. Bond was based on two of the five petitions filed. The petitions cited Bond for admiring the courage of those who burn their draft cards (R. 13), adhering to and giving aid and comfort to the enemies of the state and the country in violation of the Selective Service law (R. 14), and bringing disrespect on the Georgia House of Representatives (R. 14). They concluded that Bond's statements and actions made it impossible for him to take the oath of office (R. 15, 19).

Mr. Bond testified that he still concurred fully in the statement without reservation (R. 37); that with respect to those who burned draft cards to protest American warfare in Vietnam, he admired people "who feel strongly enough about their convictions to take an action like that knowing the consequences that they will face" (R. 41); and that he "never suggested or counseled or advocated that any other person burn their draft card . . . I do not advocate that people should break laws" (R. 41).

After presentation of the evidence, the Special Committee went into executive session (R. 86) and shortly afterwards on the same day reported its recommendation that Bond not be seated (R. 88). A minority report was also presented (R. 89).

The majority report was adopted by the House by a vote of 184 to 12 (R. 99) and Bond was denied his seat.

This suit was filed in the District Court on January 13, 1966. The cause was decided on February 10, 1966, adversely to appellant, Chief Judge Tuttle dissenting. It is reported at 251 F. Supp. 333 (1966).

ARGUMENT

I.

The Court below construed the free speech issue in conflict with principles announced by this Court.

The central issue in this case is whether an elected representative can be denied his seat in a state legislature solely because of speech reflecting his political views. Although the court below recognized that "the substantial issue in the case rests on the guarantee of freedom of speech or to dissent under the First Amendment" (*Bond* v. *Floyd,* 251 F. Supp. 333, 339; R. 142), it resolved the free speech issue with a singular disregard for the panoply of safeguards this Court has developed to protect First Amendment freedoms. The majority particularly erred in its application of the separation of powers doctrine to the substantive principles involved.

The foundation of the court's opinion was its view that the resolution of the First Amendment claim "must be in the context of two fundamental principles of government: separation of powers and state government under our system of federalism." *Ibid.* Proceeding from that premise, the majority developed a novel version of the balancing test whose ingredients became "the separation of powers principle, a system of federalism and individual rights . . ." (*Id.* at 343; R. 150).[3]

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[3] The majority's consideration of "a system of federalism" to aid in the resolution of the free speech issue was also in error. The majority acknowledged that the separation of powers principle does not apply vertically as between the state and federal governments, but it nonetheless attached some weight to the doctrine by stating that federal rights were subject to "whatever rights were

In developing its test, the majority did not rely on any cases in which this Court applied the balancing test but drew instead from two equal protection cases, *Snowden* v. *Hughes*, 321 U. S. 1 (1944) and *Baker* v. *Carr*, 369 U. S. 186 (1962). The necessity for a showing of "invidious, purposeful discrimination to give rise to relief under the equal protection clause" in these two cases was taken to prescribe "some restraint" in cases involving "state political questions concerning particular offices as distinguished from whole systems such as are prevalent in malapportionment, or racial discrimination" (251 F. Supp. at 343; R. 150).

The majority recognized that if a state legislature were to deny a Negro his seat because of his race, a federal court could properly intervene (*Id.* at 338; R. 139-140). But the court found that where First Amendment rights were at issue, the separation of powers principle was paramount. The result of this theory was to displace the First Amendment from its special position despite delicate treatment of free speech issues in case after case by this Court.

This special treatment has gone beyond the principle that First Amendment freedoms "occupy a preferred position."[4] For example, this Court has developed special

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left by the Fourteenth Amendment to the legislative branch for control of their internal affairs under our system of federalism." (*Id.* at 340; R. 144.) The First and Fourteenth Amendments and the Supremacy Clause forbid the introduction of vague principles of federalism to decide free speech questions.

[4] *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); see also *Thomas* v. *Collins*, 323 U. S. 516, 527, n. 12, 530 (1949); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Smith* v. *California*, 361 U. S. 147, 169 (1959) (Douglas, J., concurring).

rules limiting the presumption of constitutionality that normally accompanies legislation affecting First Amendment rights,[5] restricting the breadth of legislation touching speech so that only narrowly drawn statutes pass constitutional muster,[6] and forbidding assignment of the burden of proof which results in self-imposed restrictions on speech.[7] Even where First Amendment claims have been defeated, this Court has cautioned that "even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake." *American Communications Association* v. *Douds*, 339 U. S. 382, 397 (1949).

In the face of these cases, among others, the majority's injection of the separation of powers doctrine to limit First Amendment protection is in serious error. The root of this error is the court's assumption that separation of powers is a substantive principle of law which dominates free speech. But the significance of the separation of powers doctrine, on the contrary, stems from its jurisdictional aspect, the question traditionally being which branch of government has jurisdiction or power to proceed in a given area.[8] Thus, "where the Constitution assigns a par-

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[5] *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938). See also *Stromberg* v. *California*, 283 U. S. 359, 369-70 (1931).

[6] *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Cramp* v. *Board of Instruction*, 368 U. S. 278 (1961); *Cantwell* v. *Conn.*, 310 U. S. 296 (1940).

[7] *Speiser* v. *Randall*, 357 U. S. 513 (1958).

[8] Notably, the court below buttressed its reliance on the separation of powers doctrine with precedents announcing the doctrine as a matter of jurisdiction (339 F. Supp. 339-342; R. 141-148). Moreover, the court noted that defendants had raised separation of powers in a jurisdictional context, claiming that the Georgia legislature had "sole and exclusive jurisdiction" (*Id.* at 338; R. 139). Significantly the court rejected defendant's argument, say-

ticular function wholly and indivisibly to another department the federal judiciary does not intervene." *Baker* v. *Carr*, 369 U. S. 186, 246 (1962) (Douglas, *J.*, concurring). But it is altogether novel to assert that the doctrine has substantive aspects in First Amendment cases once the threshold jurisdictional question is settled. Once it is held that an issue is properly before the judiciary rather than another branch of government, the court must then decide the substantive issues at hand.

The separation of powers doctrine has never prevented this Court from extending the protection mandated by the First Amendment. On the contrary, it has consistently recognized that "[t]he ultimate responsibility to define the limits of state power regarding freedom of speech and expression rests with this Court." *Wood* v. *Georgia*, 370 U. S. 375, 386 (1962). *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 177-178 (1803), has for 163 years been the beacon.[9] Especially where First Amendment rights are at stake, a

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ing, "the court has jurisdiction over a denial of First Amendment rights by the state" (*Id.* at 338; R. 140). The majority nonetheless went on to give predominant weight to the separation of powers principle.

[9] The relevant passage reads as follows:

> "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty."

See generally, *Baker* v. *Carr*, *supra*, especially pp. 208-229.

retroactive reference to the separation of powers doctrine to resolve the issues is without basis.

II.

The function of free debate, and the special obligation of public officials in a democracy, require explicit recognition of the principle that an elected official cannot be penalized for expression of views which relate solely to a public issue.

In *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), this Court articulated a functional interpretation of the First Amendment which stressed the uses of free speech and the purposes it serves in a democratic society.[10]

> "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U. S. at 270.

Rather than basing its opinion narrowly on one or another of the traditional free speech tests, the Court's functional analysis concentrated on the need for unfettered discussion of public issues and extracted from the First Amendment a " 'central meaning'—a core of protection without which democracy cannot function."[11]

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[10] "[T]he opinion makes a notable shift in constitutional idiom and could provide a new start for consideration of free-speech problems." Kalvan, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment.' " 1964 Sup. Ct. Rev. 191, 194.

[11] Kalvan, *supra,* at 205.

In *New York Times,* the Court went beyond the specific facts of the case and seemed "clearly driven by a concern for the central meaning of the First Amendment," [12] meant to serve on other occasions as well. If "its portend is almost beyond prediction" [13] as a general guide to First Amendment problem-solving, *New York Times* establishes a quite predictable basis for measuring First Amendment protection for those in public life.

The public official rule, like the absolute privileges enjoyed by Congressmen,[14] is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr* v. *Matteo,* 360 U. S. 564, 572-573 (1959). The Court in *New York Times* declined to bottom its opinion on abstractions about liberty and freedom but focused pragmatically on the view that democratic governments preserve themselves free from instability and violence by responding to the dialectic of public debate. The necessary participation of public officials in the continuing debate which a democracy must invite, accounts for their special privileges and responsibilities.

This bedrock of policy, based on the necessities of democratic government, guarantees the preservation of free

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[12] *Id.* at 210.

[13] *Id.* at 191.

[14] U. S. Const., Art. I, Para. 6, cl. 1, provides:

"The Senators and Representatives . . . shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech and debate in either House, they shall not be questioned in any other place."

See *Kilbourn* v. *Thompson,* 103 U. S. 168 (1888).

speech by insuring it in the public arena where public officials are concerned, quite apart from the law of libel. If protection against defamation can be withdrawn to foster free debate, even when a legislator is falsely maligned, the legislator in turn should enjoy immunity from sanctions of any kind where only public issues are under discussion. As one of the principal draftsmen of the Constitution said:

> "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense." Works of James Wilson 38 (Andrews ed. 1896).

In *Garrison* v. *Louisiana*, 379 U. S. 64 (1964),[15] and *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966),[16] this Court clarified its concern with the public-debate aspect of *New York Times*. Looking to the necessities of democratic government, the Court in *Garrison* said that, "speech concerning public affairs is more than self expression; it is the essence of self-government" (379 U. S. at 74-75), and concluded that, "The public-official rule protects the paramount public

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[15] *Garrison* put aside the distinction between civil and criminal actions "where criticism of public officials is concerned," pointing out that it is speech, not the form of the remedy which is fundamental.

[16] *Rosenblatt* ruled that a manager of a ski resort was a public official whose actions were subject to the range of criticism afforded by *New York Times*.

interest in a free flow of information to the people concerning public officials, their servants" (*Id.* at 77).[17]

New York Times was not the first case in which the Court emphasized the nexus between First Amendment rights and the function of a particular group in a democratic society. In *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (1952), Justices Frankfurter and Douglas noted that:

> By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers, brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.[18]

The special function of teachers as recognized in *Sweezy* has its counterpart in the special responsibility of pub-

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[17] See also *Rosenblatt* v. *Baer*, 383 U. S. at 85. The majority opinion in *New York Times* left open the question of the breadth of the public official category. 376 U.S. at 283, n. 23. *Rosenblatt*, however, suggests that one who has "thrust himself into the vortex of the discussion of a question of pressing public concern" may bring himself within the public official rule. *Id.* at 86, n. 12. See also Comment, "The Scope of First Amendment Protection from Good Faith Defamatory Error," 75 Yale L. J. 642 (1966).

[18] See also *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957).

lic officials as elucidated in *New York Times.* Both teachers and public officials owe large duties to society which require that the channel between them and the public be unobstructed. *Sweezy* and *New York Times* provide the basis for a ruling that public officials cannot be penalized for statements relating solely to public issues.

The Speech and Debate Clause of the Constitution, though limited to congressional floor debate, and the cases interpreting the clause, further emphasize the special importance of free speech for legislators. In *United States* v. *Johnson,* 383 U. S. 169 (1966), this Court expressly recognized that the First Amendment and the Speech and Debate Clause serve the same purposes and, citing *New York Times,*[19] adopted the functional approach in looking "particularly to the prophylactic purposes of the clause." 383 U. S. at 182. While recognizing the peculiar history attached to the Speech and Debate Clause,[20] this Court noted its necessary connection to "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments." 383 U. S. at 182, n. 12.

The Speech and Debate clause has been expansively interpreted by this and other courts.[21] In *Coffin* v. *Coffin,* 4

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[19] 383 U. S. at 182, n. 12.

[20] *Id.* at 182-183.

[21] Art. I, Sec. 6, cl. 1, was taken directly from English law, and was approved without discussion or opposition. See 5 Elliot's Debate 406 (1836 ed.). The leading English cases, *Stockdale* v. *Hansard,* 9 Ad. & E. 1, 122 Eng. Rep. 1112 (Q. B. 1939), and *Ex parte Watson,* 4 Q. B. 573 (1869), construed the privilege broadly. *Ex parte Watson, supra,* cited by both the circuit court and the Supreme Court in *United States* v. *Johnson, supra,* declared that for "speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, the member enjoys complete immunity." *Ex parte Watson* at 1156.

Mass. 1 (1808), the Massachusetts Supreme Court viewed the State's speech and debate privilege as embracing "every .... act resulting from the nature, and in the execution, of the legislator's office." *Id.* at 27. Adopting the language of the Massachusetts case, this Court in *Kilbourn* v. *Thompson*, 103 U. S. 168 (1888), held that a legislator could not be sued for false imprisonment for issuing a report or for voting for a resolution.[22] Assuring that the immunity afforded would be absolute, *Cochran* v. *Couzens*, 42 F. 2d 783 (D. C. Cir. 1930), cert. denied, 282 U. S. 874 (1930), held that the privilege protected against maliciousness even if the disputed words were not pertinent to the subject before the legislature. Finally, *United States* v. *Johnson, supra*, found the Speech and Debate Clause a bar to a criminal prosecution for bribery against a congressman who was charged with delivering a speech on the floor as part of an illegal scheme.[23]

The strong presumption in favor of unlimited legislative speech suggests that its purposes do not end at the door of the legislative chamber. *Barr* v. *Matteo, supra*, although drawing sustenance from the Speech and Debate Clause,[24] concerned not a legislator but an acting director of the Office of Rent Stabilization, who was sued for libel for issuing a press release announcing his intention to suspend certain employees. Despite an allegation of malice, this

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[22] In a particularly broad interpretation, the clause was held to go beyond "words spoken in debate" to cover anything "generally done in a session of the House by one of its members in relation to the business of the House." 103 U. S. at 204.

[23] This Court rejected the government's attempt to construe the Clause narrowly so as to protect congressmen only against non-criminal actions such as libel. 383 U. S. at 182-183.

[24] 360 U. S. at 569, n. 6.

Court held that the press release was absolutely privileged. Even though the issuance of press releases was outside of those duties required by law of the official, the Court looked to the "reasons which underlie the recognition of the privilege" and concluded that when officials " . . . speak out . . . in respect to matters of public interest and concern," they must be protected "not for their private indulgence but for the public good." 360 U. S. at 575. *Barr* v. *Matteo,* like *New York Times* "confirm[s] the proposition that the Court is carried along by a momentum of insight about the democratic necessities of free speech." [25]

Barr v. *Matteo* was also cited in *New York Times* to emphasize the importance of reciprocity of protection where free speech is concerned.[26] Paradoxically, however, though appellant was penalized (as were his constituents) by exclusion from the state legislature, the State is without power to punish in any way the original authors of the statement in issue. Thus, the State has been able to penalize appellant only because he was a publicly elected official. Despite special protection afforded public debate on "matters of the highest public interest and concern" (*New York Times* v. *Sullivan, supra,* at 266) and the important role of the public official in that debate, appellant has incurred the special penalty of exclusion from the legislature as punishment, rather than the special privileges associated with free speech and public office.

The penalty of exclusion from the state legislature, moreover, cannot be justified on the basis of the content of the

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[25] Kalvan, *supra,* at 209.

[26] "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." 376 U. S. at 282-283.

SNCC statement. The court below referred to the statement as being "at war with the national policy of this country" and "a call to action based on race." Going even further, in a remarkable passage, the majority outlined the various elements of that "national policy," as if there were or should be general agreement concerning them. It seems clear that both the majority below and the Georgia legislature were moved to the decision excluding appellant because of the views expressed in the SNCC statement. This is especially clear in the case of the Georgia legislature, which found the entire statement relevant in denying appellant the right to take the oath (R. 88).

Despite the majority's extensive analysis of the statement and its distaste for the views expressed, the court claimed to rest its decision on those parts of the SNCC statement "freighted with racial overtones and . . . at variance with the established national concept of [the] country . . . only insofar as it relates to the call not to support the Selective Service System" (251 F. Supp. at 345, R. 153).[27] Even if the court's opinion revealed so carefully drawn a distinction between different levels of advocacy, the SNCC statement would be protected by the First Amendment.

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[27] The majority opinion, in basing its decision on the "call to action," erroneously cited that part of the SNCC statement expressing support for those who refuse the draft (251 F. Supp. at 344, R. 152). This statement of "sympathy . . . and support" is no more an illegal call to action than would be an expression of sympathy and support for murderers, robbers, or revolutionaries. Sympathy for lawbreakers is not advocacy of their conduct. The only portion of the SNCC statement advocating action is the last paragraph (R. 187), which urges Americans to seek to make civil rights work an alternative to the draft. This is a classic advocacy of a change in the law. Compare the advocacy at issue in *Taylor v. Mississippi*, 319 U. S. 583, discussed *infra*.

Although the SNCC statement does not advocate illegal action, it would be protected under this Court's decisions if it did. *Kingsley Picture Corp.* v. *Regents,* 360 U. S. 684, 689 (1959) emphasizes that advocacy of illegal conduct (there, adultery) enjoys constitutional protection:

> "Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.' *Whitney* v. *California,* 274 U. S. 357, at 376 (concurring opinion). 'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech.' Id. at 378."

Even before *Kingsley,* this Court had dealt with the more serious question at issue here of advocacy of opposition to war.[28] Significantly, the clear and present danger

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[28] This Court has been especially wary of restrictions on the discussion of subjects of current controversy and interest, including war. See *Taylor* v. *Mississippi,* 319 U. S. 583 (1943). Each period has its volatile public debate which can erupt into public disorder and which seems destructive of values deeply held at the moment. In the 1930's, the rights of employers and workers was such an issue, but this Court affirmed the right to picket declaring:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940).

See also *N. L. R. B.* v. *Ford Motor Co.,* 14 F. 2d 905 (6th Cir. 1940), cert. den. 312 U. S. 689, allowing employers the corollary right to distribute statements disparaging labor unions.

When the country had just completed a war in which racism was one of the agitating issues, a street speaker won First Amendment

test developed by this Court was born in time of war. Justice Holmes, who wrote the majority opinion curtailing speech in *Schenck* v. *United States*, 249 U. S. 47 (1919), dissented in a war protest case the next year because no clear and present danger had been shown:

> "The power [to punish speech] is undoubtedly greater in time of war than in time of peace because war opens dangers that do not exist at other times.
>
> But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Abrams* v. *United States*, 250 U. S. 616, 627-628 (1920).

This view was adopted in *Taylor* v. *Mississippi*, 319 U. S. 583 (1943), arising out of World War II. Taylor's tract, which was remarkably similar to the SNCC release at issue here,

> "stated it was wrong for our President to send our boys across in uniform to fight our enemies; that it

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protection for highly unpopular views that struck close at the aroused public disdain for racial and religious bigotry:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

> was wrong to fight out enemies; that these boys were being shot down for no purpose at all; that the two women's sons [who had been killed in battle overseas] may have felt they were doing the right thing to fight our enemies, but it was wrong; that Hitler would rule but would not have to come here to rule." 319 U. S. at 586.

This Court reversed Taylor's conviction for teaching and disseminating literature calculated to encourage disloyalty against the state and national governments, a charge reminiscent of that lodged against appellant here.

Even in the midst of the Civil War when fear of disloyal legislators might be expected to have been most intense, Congressmen were allowed to take their seats despite statements going far beyond appellant's:

> It is noteworthy that although the terms of [the Test Oath Act of July, 1862] included much more than treason, the ironclad oath was not used to bar members for personal disloyalty or passive sympathy with the rebellion, or speeches denouncing the war as an abolition war and opposing any further aid toward its prosecution. Thus, even in the heat of the Civil War, disloyalty was not a bar to an elected member of Congress, until it was expressly made so by a statute, and not then unless it was evidenced by actual aid to the enemy or words of acute virulence. Chafee, *Free Speech in the United States* 263 (1946).

Finally, the case most similar to appellant's was never brought to court. In 1919 the New York legislature refused to seat five socialists because of their political views.[29]

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[29] Chafee, *supra*, pp. 269-282. See also pp. 247-269.

The brief prepared by a distinguished Special Committee of the Bar of the City of New York for presentation to Judiciary Committee of the New York State Assembly supports appellant's position here.[30] The brief very largely used the functional approach adopted by this Court in the *Times* case, as demonstrated by this passage:

> If a majority [of the legislature] can exclude the whole or part of the minority because it deems the political views entertained by them hurtful, then free government is at an end. The rabid free trader for years regarded those who favored a protective tariff as the enemies of the country. The ante-bellum slaveowners considered an abolitionist as a revolutionary (p. 32).

CONCLUSION

The SNCC statement was lawful measured by the standards this Court has recognized. Its similarity to statements by prominent public figures concerning the Vietnam conflict cannot be overlooked.[31] The danger of the majority

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[30] That brief deserves special consideration in light of the eminence of its authors, including a former Chief Justice of this Court, Charles Evans Hughes.

[31] Compare the statements of Senator Wayne Morse:

> [T]here are two tyrannies in a contest for each other. There is the Vietcong, which follows the Communist line; and there is the South Vietnam military tyrant, who follows the line of military fascism—supported, sad to say, by the United States.
>
> We do not have the slightest basis under international law for engaging American boys in a military operation in a civil war in South Vietnam. 110 Cong. Rec. 7927 (1964)
>
> We are pursuing neither law nor peace in southeast Asia. We are not even pursuing freedom. We are maintaining a military dictatorship over the people of South Vietnam, headed by an American puppet to whom we give the orders, and who moves only under our orders. 110 Cong. Rec. 18138 (1964)

opinion below is its failure at this late hour to take into account this Court's long regard for public debate and the special place it has assigned to public officials. The functional approach explicitly adopted in the *Times* case has distinct application where a legislator has been excluded from the legislative forum because of his views, despite his subsequent reelection in two elections. To avoid the threat of enforcement of penalties against a minority member by whim of the majority, we urge this Court to make clear that the first line of defense for the preservation of free speech is in the arena of public debate where public officials must have their say and thus never escape popular judgment.

Respectfully submitted,

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